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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 68

SAM L. McDONALD and ANDREW BYRD, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

REPLY BRIEF OF APPELLANTS

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INDEX

SUBJECT INDEX

Argument	PAGE
I. The Illinois absentee voters law does not meet the requirements of Equal Protection of the Laws	1-2
II. Incarcerated citizens, who are registered and qualified to vote, are constitutionally entitled to cast their ballot by mail, in order to avoid an impermissible consequence of pre-trial detention	3-4
Conclusion	4

AUTHORITIES CITED

CASES:

Brown v. Post, 279 F. Supp. 60 (W.D. La. 1968)	2
Coffin v. Reichard, 143 F. 2d 443 (6th Cir. 1944)	3
Cooper v. Pate, 378 U.S. 546 (1964)	3
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)	2
Ruffin v. Commonwealth, 62 Va. (21 Grath) 790 (1871)	3

OPINIONS OF ATTORNEY GENERAL:

Rep. Atty. Gen. Maine 1961-62 pp. 183-84	2
Rep. Atty. Gen. Minnesota 1930 p. 215, No. 229	2

CONSTITUTIONAL PROVISION:

Equal Protection Clause, Fourteenth Amendment, United States Constitution	2

TEXT:

Foote, *The Coming Constitutional Crisis In Bail: II*, 113 U. Pa. L. Rev. 1125 (1965)	3

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I.

The Illinois Absentee Voters Law Does Not Meet the Requirements of Equal Protection of the Laws.

The significance of the Board of Election Commissioners' characterization of absentee voting in Illinois as a "privilege" rather than a "right" is unclear. Clearly, the exercise of the franchise, by whatever means—mail or in person—

cannot be denied arbitrarily, or for some constitutionally irrelevant reason. *Brown* v. *Post*, 279 F. Supp. 60 (W.D. La. 1968) (absentee voting-discrimination on basis of race); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) (voting in person-discrimination on basis of wealth).

The central question is whether a classification used to disenfranchise a class of citizens is consistent with the Equal Protection Clause. States have broad power to differentiate. But, in the area of voting, which is preservative of other basic civil and political rights, any infringement must be carefully and meticulously scrutinized.

Citizens detained behind bars, while awaiting preliminary hearing or trial on alleged criminal (or civil) charges, are just as incapable of getting to the polls on election day as persons who are granted absentee ballots in Illinois (ill, religious, out-of-county, and election judges).

The Board of Election Commissioners has failed to articulate what legitimate state interest might be served by denying absentee ballots to registered and qualified voters, who are actually incapable of being present at the polls, because of temporary commitment to jail in the county of their residence, while awaiting preliminary hearing or trial. Surely, such disenfranchisement cannot be justified by the need to maintain institutional order and security; voting helps, rather than hurts, prison morale. Moreover, prisoners detained outside the county of their residence are entitled to vote by mail in Illinois. Indeed, in at least two other states, the Attorney General has explicitly upheld the right of prisoners, not convicted of a felony, to vote by absentee ballot. See, Rep. Atty. Gen. Maine 1961-62 pp. 183-84; Rep. Atty. Gen. Minnesota 1930 p. 215, No. 229.

Upon analysis, it is clear that the discrimination practiced in Illinois against voters incarcerated in the county of their residence is arbitrary and irrational.

II.

Incarcerated Citizens, Who Are Registered and Qualified to Vote, Are Constitutionally Entitled to Cast Their Ballot by Mail, in Order to Avoid an Impermissible Consequence of Pre-Trial Detention.

Long ago, a prisoner was regarded by the law as a slave of the state. *Ruffin* v. *Commonwealth*, 62 Va. (21 Grath) 790, 792 (1871). In modern times, there is growing recognition that "(a) prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law." *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944).

This Court has never sanctioned the absolute denial of basic, fundamental, human rights, merely because a citizen is imprisoned. *Cooper* v. *Pate*, 378 U.S. 546 (1964). Given the presumption of innocence, secured after centuries of struggle, it is logical that the rights of the pre-trial detainee should be at least equal to, if not greater than, the rights of the convict.

Recently, increased concern has been shown by persons working in the criminal process with the terms and conditions of pre-trial incarceration. See generally, Foote, *The Coming Constitutional Crisis In Bail: II*, 113 U. Pa. L. Rev. 1125 (1965). This Court has not yet had the opportunity to decide which, if any, consequences of pre-trial detention are constitutionally justifiable. Of the various

deprivations suffered upon confinement, loss of the ballot is perhaps the most flagrant (in the hierarchy of constitutional freedoms) and the least justifiable (from the viewpoint of the state's legitimate interests).

Appellants do not suggest that prisoners qualified to vote be marched to the polls by the Sheriff on election day. Rather, where the State has established a workable system of voting by mail, and the casting of an absentee ballot does not interfere with the maintenance of institutional order and security, then qualified prisoners confined in the county of their residence are entitled to be furnished absentee ballots.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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